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No. 78-1438

In the Supreme Court of the United States

OCTOBER TERM, 1978

ILLINOIS OFFICE OF EDUCATION, PETITIONER

v.

DANIEL L. JENNINGS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioner contends that the district court's award of back pay to respondent under the Veterans' Reemployment Rights Act violated the Eleventh Amendment.

Petitioner employed respondent from October 1973 to June 1974, when respondent joined the Navy. He served on active duty until August 1975, when he was honorably discharged. He made a timely application to return to his former job with petitioner, but petitioner refused to rehire him. Respondent then sought assistance from the Department of Labor, which informed petitioner that respondent was entitled to be reinstated to his former position under the Veterans' Reemployment Rights Act, 38 U.S.C. 2021 *et seq.* On March 12, 1976, petitioner agreed to rehire respondent. Respondent refused the offer because he had taken a job with the Illinois Division of Vocational Rehabilita-

tion a month earlier. He then brought this suit, seeking back pay for the period that petitioner had refused to rehire him[1] (Pet. App. B1-B2).

The United States District Court for the Southern District of Illinois entered summary judgment for respondent, holding that he is entitled to back pay (less any earnings he received from other sources during that period), and that his claim is not barred by the Eleventh Amendment (Pet. App. A1-A10).

The court of appeals, in a thorough opinion on which we rely, affirmed (589 F. 2d 935; Pet. App. B1-B20). It held that the Veterans' Reemployment Rights Act (the Act) is an exercise of congressional power under the War Powers Clauses[2] (Pet. App. B5-B7) and that, under the analysis of *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), the Eleventh Amendment does not bar recovery against a state. The court of appeals acknowledged that the statute allowing recovery against a state for employment discrimination in *Fitzpatrick* was enacted under the authority of Section 5 of the Fourteenth Amendment, while the Act at issue here was based on the War Powers Clauses (Pet. App. B13-B17), but it held that "[n]othing in *Fitzpatrick* suggests" that the result there would have been any different if "the authorization to sue was enacted under" Article I rather than the Fourteenth Amendment (Pet. App. B17).

Petitioner does not dispute that Congress has expressly authorized respondent to sue it under the

[1]The Department of Justice represents respondent pursuant to 38 U.S.C. 2022.

[2]"The Congress shall have Power * * * [t]o raise and support Armies * * * [and] [t]o provide and maintain a Navy * * *." Art. I, Sec. 8, cl. 12, 13.

Act,[3] nor does it contest either its liability under the Act or the amount of back pay awarded. It does not contend that the substantive provisions of the Act exceed Congress' power. Its sole contention is that, as applied to a state, the Act violates the Eleventh Amendment (Pet. 4-14). The argument, in other words, is that this suit should have been brought in state court rather than federal court.

The decision of the court of appeals is the first appellate opinion that has addressed the question presented here. There is thus no conflict among the circuits. Every district court that has considered the question has agreed with the disposition reached here.[4] In the absence of a conflict among the circuits, there is no reason for review by this Court.

The court of appeals' decision, moreover, is correct. A line of cases has established that Congress, in the exercise of powers granted by the Constitution, can require states to defend suits in federal courts. Congress need only exercise its power clearly. See *Quern* v. *Jordan*, No. 77-841 (Mar. 5, 1979); *Hutto* v. *Finney*, 437 U.S. 678 (1978); *Fitzpatrick* v. *Bitzer*, *supra*; *Employees* v. *Missouri Public Health Department*, 411 U.S. 279 (1973). "Congress has plenary power to set aside the States' immunity from

[3]In 1974 Congress amended the Act to apply to states and political subdivisions acting as employers. Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, Section 2021(a)(B), 88 Stat. 1594. See Pet. App. B4.

[4]See *Witter* v. *Pennsylvania National Guard*, 462 F. Supp. 299 (E.D. Pa. 1978); *Camacho* v. *Public Service Commission*, 450 F. Supp. 231 (D.P.R. 1978); *Schaller* v. *Board of Education*, 449 F. Supp. 30 (N.D. Ohio 1978); *Peel* v. *Florida Department of Transportation*, 443 F. Supp. 451 (N.D. Fla. 1977), appeal argued, No. 77-1846 (5th Cir. June 20, 1978); *Sheely* v. *Idaho Falls School District*, 84 Lab. Cas. para. 10,911 (D. Idaho 1978).

retroactive relief in order to enforce the Fourteenth Amendment." *Hutto* v. *Finney, supra*, 437 U.S. at 693. That much is unquestioned. It is also unquestioned that Congress has explicitly set aside the states' immunity and subjected them to suit in federal courts in veterans' reemployment cases. See note 3, *supra*. The only question presented here, therefore, is whether Congress' power to subject states to suit in federal courts must rest on authority derived from the Fourteenth Amendment or, instead, may rest on authority conferred by other provisions of the Constitution.

There is no reason why such a distinction should be made, and the premise of this Court's decision in *Missouri Public Health Department* is that such a distinction would not be made. The Veterans' Reemployment Act is supported by Congress' authority to "provide[ ] the mechanism for manning the Armed Forces of the United States." *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 583 (1977). See also *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-285 (1946).

> [T]he power has been expressly given to Congress to prosecute war, and to pass all laws which shall be necessary and proper for carrying that power into execution. That power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the constitution or by any one of the amendments. These may all be construed so as to avoid making the constitution self-destructive * * *.

Lichter v. *United States*, 334 U.S. 742, 781 (1948), quoting Hughes, *War Powers Under the Constitution*, 42 A.B.A. Rep. 232, 247-248 (1917).

The power to "raise and support Armies" and to "provide and maintain a Navy" was delegated to the national government in the Constitution, and the court of appeals properly concluded (Pet. App. B13-B17) that it is no less plenary than the power to enforce the Fourteenth Amendment. As that court stated: "[N]othing in the language, history or policy of the Eleventh Amendment or the doctrine of sovereign immunity forecloses Congress, acting under a delegated power, from making a state amenable to suit in the federal courts" (*id.* at B13).

Against this analysis, petitioner argues that: "Focusing on federalism leads to the conclusion that the Eleventh Amendment should be viewed as a restriction on both the judicial power to entertain, and the congressional authority to create private damage actions in the federal courts" (Pet. 6). But this vague "[f]ocus[ ] on federalism" ignores the analysis of *Fitzpatrick*, *Hutto*, and the other cases discussed above. Petitioner offers no convincing reason why that analysis must be "carefully limited * * * to suits arising under §5 of the Fourteenth Amendment" (Pet. 10).[5]

In fact, petitioner concedes that "Congress has the unquestioned authority to preempt this field" and argues that, since it did not, "there are no factors militating strongly in favor of exclusive federal jurisdiction in veterans' reemployment cases" (Pet. 12). But this approach fails for two reasons. First, if Congress can preempt the field without violating the

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[5]This Court has, moreover, explicitly held that Acts of Congress that are necessary and proper to the exercise of the war powers may properly intrude into "area[s] normally left to the States * * *." *United States* v. *Oregon*, 366 U.S. 643, 649 (devolution of property).

Eleventh Amendment, it does not sacrifice that power merely by allowing states to provide their own remedies in cases of veterans' reemployment. Indeed, petitioner's analysis is refuted by *Fitzpatrick* itself, because Congress did not forbid states to provide their own remedies for employment discrimination based on race, sex or other factors. See 42 U.S.C. 2000e-5(c).

Second, the court of appeals did not hold that there was "exclusive federal jurisdiction in veterans' reemployment cases," as petitioner implies (Pet. 12). It merely held that the federal right that Congress provided was within its powers; nothing in the opinion suggests that state statutes providing similar remedies are ousted by the federal Act, or that state courts are to be closed.[6] See 38 U.S.C. 2021(c). Therefore, petitioner's argument that the Act "constitute[s] an unwarranted intrusion into the local affairs of this State" (Pet. 12) is unsupported.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[6]Illinois has provided such remedies. See Pet. 5 n.1.

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